IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. [illegible]

[illegible],
Petitioner,

vs.

THE GAS SERVICE COMPANY,
Respondent.

ALFRED P. MARTIN,
Petitioner,

vs.

THE GAS SERVICE COMPANY,
Respondent.

BILTWELL COMPANY, INC., TIPTON MANUFACTURING CO., GLENRIDGE TROUSERS COMPANY, and EMBASSY MANUFACTURING COMPANY, *Petitioners*,

vs.

THE GAS SERVICE COMPANY,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 501.

NAOMI WOOD,
Petitioner,

vs.

THE GAS SERVICE COMPANY,
Respondent.

ALFRED F. MARTIN,
Petitioner,

vs.

THE GAS SERVICE COMPANY,
Respondent.

BILTWELL COMPANY, INC., TIPTON MANUFACTURING CO., GLENRIDGE TROUSERS COMPANY, and EMBASSY MANUFACTURING COMPANY, *Petitioners,*

vs.

THE GAS SERVICE COMPANY,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully pray for a rehearing of the order denying a writ of certiorari entered in these causes on November 25, 1957.

This petition is filed pursuant to Rule 58 of this Court and is based on the following grounds available to, but not previously presented by, petitioners:

I.

The Court of Appeals for the Eighth Circuit Habitually Applies a Rule of Appellate Review Which (1) Conflicts with the Decisions of This Court, (2) Conflicts with the Practice of All Other Circuits, and (3) Destroys the Fundamental Right of Appeal in All Cases in Which It Is Used by Making the Federal Trial Judges in Effect the Final Arbiters of Local Law.

In this case the Court of Appeals used the "rule of deference" to affirm a judgment that was contrary to the controlling Missouri law, pointing out that the question was "not whether the conclusion of the trial court as to a question of local law is necessarily *correct*, but whether the Court reached a *permissible* conclusion." (245 F. 2d 653, 657) (Emphasis ours).

The Eighth Circuit Court of Appeals admits that its rule does not require the application of the "correct" rule of law (*National Bellas Hess, Inc.*, v. *Kalis*, 191 F. 2d 739; *Guyer* v. *Elger*, 216 F. 2d 537, 540; *Milwaukee Ins. Co.* v. *Kogen*, 240 F. 2d 613, 615; the case at bar, 245 F. 2d 653, 657); it will affirm the trial court even though it may think the law is or might be otherwise (*Western Casualty & Surety Co.* v. *Coleman*, 186 F. 2d 40, 43; *Buder* v. *Becker*, 185 F. 2d 311, 315).

Obviously, a rule of appellate practice which permits affirmance of a trial court's judgment though not "necessarily correct," thwarts the very purpose of review, namely, to correct miscarriages of justice resulting from an incorrect interpretation of the law. If there be a right of

appeal at all, there must be only one permissible conclusion, and that is the correct and just conclusion *as determined by the Appellate Court by the exercise of its independent judgment.*

The Court of Appeals for the Eighth Circuit habitually uses this device to evade its duty to determine the state law. *There is not a single case in all the other nine circuits where the rule has been used to affirm; yet it has been so used in no less than 54 cases in the Eighth Circuit since 1943.*[1]

This situation is one of grave concern to the litigants and appellate bar of Missouri. It has been the subject of

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[1]*Magill* v. *Travelers Ins. Co.*, 133 F.2d 709, 713; *Doering* v. *Buechler*, 146 F.2d 784, 788; *Railway Mail Ass'n* v. *Chamberlin*, 148 F.2d 206, 208; *Russell* v. *Turner*, 148 F.2d 562, 564; *Globe Indemnity Co.* v. *Wolcott & Lincoln, Inc.*, 152 F.2d 545, 547; *Anderson-Tully Co.* v. *Murphree*, 153 F.2d 874, 877; *Michigan Fire & Marine Ins. Co.* v. *National Surety Corp.*, 156 F.2d 329, 333; *Central Nebraska Public Power & Irrigation Dist.* v. *Tobin Quarries, Inc.*, 157 F.2d 482, 483; *Elder* v. *Dixie Greyhound Lines, Inc.*, 158 F.2d 200, 205; *Abbott* v. *Arkansas Utilities Co.*, 165 F.2d 339, 340; *Zuckerman* v. *McCulley*, 170 F.2d 1015, 1019; *Heikes* v. *New York Life Ins. Co.*, 171 F.2d 460, 464; *Mast* v. *Illinois Central R. Co.*, 176 F.2d 157, 163; *Traders & General Ins. Co.* v. *Powell*, 177 F.2d 660, 668; *Brink's, Inc.*, v. *Hoyt*, 179 F.2d 355, 359; *Northern Liquid Gas Co.* v. *Hildreth*, 180 F.2d 330, 336; *Pendergrass* v. *New York Life Ins. Co.*, 181 F.2d 136, 141; *Morgan* v. *Finnegan*, 182 F.2d 649, 650; *Nolley* v. *Chicago, M., St. P. & P. R. Co.*, 183 F.2d 566, 572; *Buder* v. *Becker*, 185 F.2d 311; *Maryland Casualty Co.* v. *Dalton Coal & Material Co.*, 184 F.2d 181, 183; *New York Cas. Co.* v. *Lewellen*, 184 F.2d 891, 894; *Fargo Nat. Bank* v. *Agricultural Ins. Co.*, 184 F.2d 676, 683; *Standard Brands, Inc.*, v. *Bateman*, 184 F.2d 1002, 1011; *Fireman's Fund Ins. Co.* v. *Vernes Credit Jewelry*, 185 F.2d 142, 146; *Western Casualty & Surety Co.* v. *Coleman*, 186 F.2d 40, 43; *John Hancock Mut. Life Ins. Co.* v. *Munn*, 188 F.2d 1, 4; *Nordin* v. *May*, 188 F.2d 411, 415; *National Bellas Hess, Inc.*, v. *Kalis*, 191 F.2d 739, 741; *Mutual Ben. Health & Accident Ass'n* v. *Cohen*, 194 F.2d 232, 241; *Ortman* v.

attack before[2], but never in a case where, as here, the result was in conflict with the clear holding of the State Supreme Court, and the result was reached without even investigating or discussing the state law.[3]

Smith, 198 F.2d 123, 127; *Cohn* v. *Little*, 199 F.2d 28, 31; *Coca-Cola Bottling Co. of Black Hills* v. *Hubbard*, 203 F.2d 859, 861; *Franck* v. *Equitable Life Ins. Co.*, 203 F.2d 473, 477; *Kimble* v. *Willey*, 204 F.2d 238, 243; *Hartford Acc. & Ind. Co.* v. *Federal Deposit Ins. Corp.*, 204 F.2d 933, 936; *Bettinger* v. *Northwestern Nat. Cas. Co. et al.*, 213 F.2d 200, 206; *Riteway Carriers* v. *Stuyvesant Ins. Co.*, 213 F.2d 576, 578; *Guyer* v. *Elger*, 216 F.2d 537, 540, cert. den. 348 U.S. 929; *Bryant* v. *Chicago Mill & Lumber Co.*, 216 F.2d 727, 734; *Lanza* v. *Carroll*, 216 F.2d 808, 814; *Am. Natl. Bank of St. Paul* v. *Nat'l Ind. Co.*, 222 F.2d 513, 519; *Chicago & Nat'l Western Railway Co.* v. *Bork*, 223 F.2d 652, 657; *Citizens Ins. Co. of N. J.* v. *Foxbilt, Inc.*, 226 F.2d 641, 643; *Frank B. Connet Lumber Co.* v. *New Amsterdam Cas. Co.*, 236 F.2d 117, 125; *Grundeen* v. *U. S. F. & G. Co.*, 238 F.2d 750, 753; *Bostian* v. *Universal C. I. T. Credit Corporation*, 238 F.2d 809, 812; *Dangaard* v. *Hawkeye Security Ins. Co.*, 239 F.2d 351, 355; *Milwaukee Ins. Co.* v. *Kogen*, 240 F.2d 613, 615; *Holzer* v. *United States*, 244 F.2d 562, 564; *Western Oil and Fuel Co.* v. *Kemp*, 245 F.2d 633, 645; *Anderson* v. *Rosebean*, 245 F.2d 673, 675.

[2]*Nat'l Bellas Hess, Inc.*, v. *Kalis*, 191 F. 2d 739, cert. den. 342 U.S. 933; *Mutual Ben. H. & A. Assn.* v. *Cohen*, 194 F.2d 232, cert. den. 343 U.S. 965. In the former case the petitioner aptly said:

> "* * * This case involves not an isolated situation but rather a widely applied rule that has pervaded the entire fabric of appellate practice in the Eighth Circuit."

[3]Gardner, Chief Judge, who joined initially in the judgment affirming, and therefore presumably knew whereof he spoke, said:

> "Manifestly, there is no dearth of authority in the decisions of the Supreme Court of Missouri on the questions here involved. *Nevertheless, the court in its decision did not consider these controlling authorities but instead accepted the views of the trial judge—thus, in effect, depriving appellants of their right of review by this court.*" (248 F.2d 683; page A17 of the Petition for Writ) (Emphasis ours).

1. The Eighth Circuit rule is in conflict with decisions of this Court.

The Eighth Circuit Court of Appeals has attempted to justify its repeated evasion of its judicial duty on the basis of certain language used by this Court (*Buder* v. *Becker*, 8 Cir., 185 F.2d 311, 315, Footnote 2), for example, this Court's statement (*MacGregor* v. *State Mutual Life Assurance Co.*, 315 U.S. 280, 281) that it would "leave undisturbed the interpretation placed upon purely local law by a Michigan Federal judge of long experience and by three Circuit judges."

Although the Eighth Circuit Court of Appeals may have been misled by such language, it is obvious that this Court never intended the various Courts of Appeals to surrender their function to the trial court. In *Huddleston* v. *Dwyer*, 322 U.S. 232, 236, this Court held, "*It is the duty of the Federal Appellate Courts, as well as the trial court, to ascertain and apply the state law* (emphasis ours)," and returned the case to the Court of Appeals requiring it to apply the state law (which is exactly what we are asking the Court to do in the case at bar). We do not believe that the *MacGregor* case, *supra*, or any other case of this Court relied upon by the Eighth Circuit Court of Appeals, was intended to circumscribe the scope of review by a Court of Appeals.

If language of this Court has misled, then this Court should grant certiorari and clarify the situation for the benefit of litigants in the Eighth Circuit and rectify the intolerable situation existing there.

2. The rule applied by the Eighth Circuit Court of Appeals is in conflict with the decisions of all the other Circuit Courts of Appeals.

Contrary to the practice of the Court of Appeals for the Eighth Circuit, all the other nine courts of appeals have accepted and followed the ruling of this Court in *Huddleston v. Dwyer*, 322 U.S. 232, 236, *supra*.

The First Circuit, in *Boston Casualty Co.* v. *Bath Iron Works Corp.*, 1 Cir., 136 F.2d 31, 33, held that "*our* only inquiry * * * is to determine whether a cause of action is stated under Maine law." (Emphasis ours).

The Second Circuit's rule is stated in *Cooper* v. *American Airlines*, 2 Cir., 149 F.2d 355, 357-8, and *Janes* v. *Sackman Bros. Co.*, 2 Cir., 177 F.2d 928, 932-3. In the latter case the court held: "We agree that to refrain from deciding, as best *we* may, the state issues presented to *us* 'would be to enervate diversity jurisdiction.' *Propper* v. *Clark*, 337 U.S. 472, 489, 490" (Emphasis ours).

The Third Circuit, in *Barrett* v. *Denver Tramway Corporation*, 3 Cir., 146 F.2d 701, 702, held that "Delaware law controls the issue and it is *our duty*, as it was the duty of the trial court, to ascertain and apply the law of that state" (emphasis ours). See also statement in *Stentor Electric Mfg. Co.* v. *Klaxon Co.*, 3 Cir., 125 F.2d 820, 823-4, upon remand from this Court (313 U.S. 487).

The Fourth Circuit, in *New England Mut. Life Ins. Co.* v. *Mitchell*, 4 Cir., 118 F.2d 414, 420, that "in ascertaining the applicable law of the state, *we* are to consider court decisions and other available sources of local law; and *we* are to apply court decisions in the light of the well-established state decisions rule and its limitations" (Emphasis ours).

The Fifth Circuit, in *Holliday* v. *Wade*, 5 Cir., 117 F.2d 154, 156, held that "the court, *as the appellate tribunal for*

this case, must assume the duty the Supreme Court of Florida would have if the case were before it * * *" (Emphasis ours).

The Sixth Circuit, in *Egyptian Supply Co.* v. *Boyd*, 6 Cir., 117 F.2d 608, 612, held that "this court will exercise an *independent judgment* in determining the law with respect to the issue here presented based upon whatever principles of state law are applicable" (Emphasis ours). See also *Maryland Casualty Co.* v. *Cassetty*, 6 Cir., 119 F.2d 602, 605.

The Seventh Circuit, in *Chicago, Wilmington & Franklin Coal Co.* v. *Herr*, 7 Cir., 127 F.2d 1010, cert. denied 317 U.S. 669, held that "it is our duty to ascertain from all the available data what the state law is and apply it." (l.c. 1011 of 127 F.2d, Emphasis ours).

The same rule is applied in the Ninth Circuit (*Hughes* v. *Mutual Life Ins. Co. of New York*, 9 Cir., 180 F.2d 542, 545) and in the Tenth Circuit (*Versluis* v. *Town of Haskell, Okla.*, 10 Cir., 154 F.2d 935, 937).

3. An appeal in which the Eighth Circuit Court of Appeals applies the rule of deference is, in fact, no appeal at all.

An appeal to a Court which does not, first, examine the applicable law and, secondly, make its own decision as to what that law is, is no appeal at all. The Eighth Circuit Court of Appeals began eliminating the second step in 1943 when it first applied the "rule of deference." In the case at bar, as evidenced by the opinion of the Eighth Circuit Court of Appeals, both steps have been eliminated, the Court apparently reasoning that, if it is going to adopt the trial court's interpretation of the law in any event, there is no need to take the time of the Court or lengthen

the opinion by an examination and discussion of the Missouri law.

In the State of Missouri alone there are six District judges. At the present time each judge could apply a different interpretation of a particular principle of state law and each would be affirmed so long as the interpretation were permissible, though not necessarily correct. In fact, the same District judge could apply different rules in various cases involving the same issues of law. Multiply by the number of states in the circuit and it becomes at once apparent that utter confusion will replace stability of the law.

It is respectfully submitted that the rule of deference as repeatedly applied by the Eighth Circuit Court of Appeals is a contrivance whereby that Court avoids its judicial duty to make an independent decision as to the state law, at the cost to Eighth Circuit litigants of not only their right to have state law applied, but of their fundamental right of appeal. The situation should be corrected *now*. The corrosive effect on the judicial structure ought to be halted without further delay.

Even though this Court is heavily burdened, this is a matter that cries for its attention, because only this Court, by granting certiorari, can guarantee to Eighth Circuit litigants equal justice under the law, restore to them their right of appeal, and reestablish stability of law in diversity cases.

For these reasons, as well as for the reasons set out in the petition for writ of certiorari, it is respectfully sub-

mitted that this petition should be granted and the Writ issue.

WILLIAM S. HOGSETT,
HALE HOUTS,
ALVIN C. RANDALL,
J. D. JAMES,
Counsel for Petitioners.

It is hereby certified by the undersigned that this petition is presented in good faith and not for delay, and that the petition is restricted to substantial grounds available to petitioners although not previously presented.

WILLIAM S. HOGSETT,
Attorney for Petitioners.